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Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARK JAMES KNIGHTS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Can a court require a defendant to accept, as a condition of probation, a search condition that is unconstitutionally broad under *Griffin v. Wisconsin*, 483 U.S. 868 (1987)?

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STATEMENT OF THE CASE

In the early hours of June 2, 1998, a Pacific Gas & Electric power transformer and adjacent Pacific Bell telecommunications vault in Napa, California, were pried open and set on fire. J.A. 13-14.[1] Although there were no witnesses to the vandalism, Respondent Mark Knights and an associate were suspected, based on an ongoing investigation Napa law enforcement officers had been conducting for approximately two years into a series of arsons in the area. *Id.* at 12-14. At 8:00 a.m. on June 3, 1998, local law enforcement officers broke down the door of Knights' apartment building and conducted a warrantless search of his apartment. Pet. App. 4a. Knights was in bed with his girlfriend when the officers entered his room. J.A. 16.

The day before the search, Napa County Sheriff's Department Detective Todd Hancock prepared an "Operations Order" for his supervisor describing the basis for his belief that Knights had participated in the recent arson and seeking permission to have other officers help with the search. J.A. 26; Supp. Excerpt of Record 1-3 (copy of operations order). Eight hours before the search, law enforcement officers set up the surveillance of Knights' apartment. Pet. App. 3a. In the hours immediately preceding the search, Detective Hancock gathered staff for the search, briefed them on the situation, and made preparations for the search. J.A. 30.

At no time during the day prior to the search did Detective Hancock seek a warrant to search Knights'

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[1] The Court of Appeals mistook the date for June 1. *See* Pet. App. 2a.

apartment. Pet. App. 4a. Instead, Detective Hancock reviewed records in the Napa County Sheriff's Department and determined that Knights was on probation and was subject to a search condition. *Id.*; J.A. 30-31. Detective Hancock relied on the existence of this search clause to search Knights' apartment instead of seeking a search warrant. Detective Hancock did not make any effort to contact the probation office or the sentencing judge before the search. Pet. App. 33a.[2]

Knights had been placed on summary probation[3] on May 29, 1998, as a result of his conviction for a misdemeanor drug offense. J.A. 50. There is no evidence that this conviction resulted from a negotiated agreement. The only evidence in the record regarding the search condition is contained in the Napa County "Probation Order," dated May 29, 1998. *Id.* The pre-printed order states that the Defendant, "having been convicted" of a misdemeanor violation, is "hereby ordered [to a] term of probation." *Id.* (all capitals in original). Possible standard terms and conditions are listed, with a box to check beside each one. One of the boxes checked was the box next to the search condition, which required the defendant to

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[2] Under California law, in the absence of an assigned probation officer, it is the judge who imposed sentence who retains the power to supervise the probationer, punish violations of probation conditions, and revoke probation. Pet. App. 33a.

[3] Under California law, "summary probation" (now called "conditional sentence") is an unsupervised form of release reserved for people convicted of infractions and misdemeanors. Cal. Penal Code § 1203(a); *City of Victorville v. County of San Bernardino*, 233 Cal. App. 3d 1312, 1319 (Ct. App. 1991).

"[s]ubmit his/her person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Id.*

Below the listed conditions is a printed notice that reads as follows:

> UPON SATISFACTORY COMPLETION OF PROBATION YOU MAY APPLY TO THE COURT TO HAVE YOUR CONVICTION SET ASIDE PURSUANT TO SECTION 1203.4 OF THE PENAL CODE. I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS AND AGREE TO ABIDE BY SAME.

Id. Below this notice the form provides a line for the defendant's signature, where Knights signed the order. Immediately below the signature line is written: "RECEIPT OF COPY ACKNOWLEDGED/DEF. SIGNATURE." *Id.* The record contains no indication of where or when Knights signed this Probation Order. The Probation Order was also executed by the court deputy and the sentencing judge. There is nothing in this record concerning any colloquy between the court and the defendant either before or after the sentence was imposed.

Relying on this search condition, the officers searched Knights' apartment for approximately 1½ hours. Record 128-29. As a result of the search, the officers seized, *inter alia*, detonation cord, ammunition, instruction manuals on chemistry, bottles with unknown

liquids, tools, a pair of pole-climbing spurs, drug paraphernalia, and a brass padlock stamped "PG&E." J.A. 17; Pet. App. 5a. Following the search, Knights was arrested.[4]

Based on the results of the search of his apartment, Knights was charged in Napa County Superior Court with receipt of stolen property, possession of a smoking device, possession of ammunition, possession of a destructive device and possession of ingredients to make a destructive device. J.A. 17-18. Nine months later, federal authorities intervened and the case was re-filed in federal court. *Id.* at 1.

Knights moved to suppress all evidence seized during the warrantless search of his apartment on grounds that the search conducted by state officers was not valid under federal law. J.A. 2. Knights argued that the search was not a valid probation search but rather had been styled as such by law enforcement as a means of evading the Fourth Amendment's warrant requirement. The government argued several different theories in response, among them the contention that Knights had consented to the search through a waiver of Fourth Amendment rights as a condition of probation. Pet. App. 24a.

After an evidentiary hearing, the district court granted Knights' motion to suppress all evidence seized in the June 3, 1998, search. *Id.* at 37a. The court ruled that

[4] Later that same day, Detective Hancock swore out an affidavit for a search warrant to search the co-defendant's truck. J.A. 43-49. The warrant was issued and the truck was searched the same day. Pet. App. 4a.

acceptance of a probation search condition does not eliminate all of a probationer's Fourth Amendment rights. *Id.* at 24a-26a. Relying on "longstanding clearly delineated case law in the Ninth Circuit regarding the standard governing probation searches," the district court concluded that the warrantless search of Knights' apartment violated the Fourth Amendment because it was an investigatory search, not a valid probation search. *Id.* at 31a-35a, 37a. To determine whether or not the search was undertaken to advance the goals of probation, rather than to further an independent criminal investigation, the court examined the record of events leading up to the search. Based on the factual record, the court found that

> the weight of the objective evidence supports a finding that a search here was undertaken for purposes of fostering the investigation of Mr. Knights' involvement in the possession and manufacture of incendiary devices primary [sic] to obtain evidence toward a criminal investigation for arson or manufacture of those same incendiary devices.

Id. at 33a.

The Court of Appeals for the Ninth Circuit affirmed. The court acknowledged that an individual may consent to a search. Noting that Knights here did consent, the court held that this consent "must be seen as limited to probation searches, and must stop short of investigation searches." Pet. App. 7a-8a. The court echoed the district court's conclusion that this warrantless search was unconstitutional because it was indisputably an investigatory search, conducted by law enforcement as part of an ongoing criminal investigation. The court considered,

and rejected, the government's contention that the decision in *Whren v. United States*, 517 U.S. 806 (1996), undermined Ninth Circuit precedents. The court noted that, in *Whren*, this Court had held that an officer's subjective intentions will not invalidate a search supported by probable cause; the ruling did not address a search for which there was no probable cause but only the probationer's consent to a search condition. Pet. App. 11a. In response to the government's expressed concern about a discrepancy between state and federal law, the court declined to modify federal law to accommodate California, noting that "[f]or at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional." *Id.* at 12a-13a.

SUMMARY OF ARGUMENT

Petitioner contends that Mr. Knights consented to the search of his home when he signed a court order confirming his acceptance of a search condition that he was *required* to accept as part of his probation. Petitioner contends that a search conducted pursuant to such a required consent falls within the consent exception to the Fourth Amendment and that, as long as Knights' consent was voluntary, the only constitutional constraint on a probation search condition is whether the condition falls afoul of the unconstitutional conditions doctrine.

Apart from true consent searches and situations presenting exigent circumstances, this Court has permitted warrantless incursions into constitutionally protected privacy rights only to the extent that there are "exceptional

circumstances" in which the "special needs" of a particular state program make strict adherence to the warrant and probable cause requirements impracticable. *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1287 n.7 (2001). Over many years, this Court has carefully constructed a "special needs" doctrine which gives the government significant latitude to conduct searches that would otherwise be impermissible under the Fourth Amendment. In each case where a legitimate special need arises, the Court has applied a balancing approach which allows limited departures from the Fourth Amendment to further important state interests. Consistently, however, this Court has "draw[n] the line" at efforts to invoke the special needs doctrine to legitimize warrantless searches which are not designed to further any special need beyond the normal needs of law enforcement. *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court addressed the circumstances under which a warrantless probation search would be tolerated. The *Griffin* Court recognized that supervision of probationers presents a "special need," beyond the normal need for law enforcement, which justifies some departure from the warrant and probable cause requirements. The *Griffin* Court clearly held, however, that the permissible degree of impingement on a probationer's Fourth Amendment rights "is not unlimited." *Id.* at 875; *see also id.* at 873 ("A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.' "). Rather, *Griffin* identified several important limitations designed to ensure that Fourth Amendment protections would be suspended only to the extent

necessary to accommodate the legitimate needs of the probation system.

The *Griffin* decision has been widely followed by both federal and state courts, which have consistently resolved the tension between the needs of a state's probation system and the individual's Fourth Amendment rights in accordance with the "special needs" balancing approach. The majority of state courts and virtually all of the federal courts of appeal rely upon the *Griffin* distinction between probationary searches, which may be performed without a warrant or probable cause, and regular investigatory searches, which may not.

California's blanket search condition is plainly unconstitutional under *Griffin* because it purports to suspend Fourth Amendment requirements for any searches by any law enforcement officer, even those that are not in furtherance of the special needs of the probation system. Petitioner seeks to avoid application of the *Griffin* limits on the theory that the search was lawful under the consent exception because Knights was required to consent to a search condition in order to receive probation.

Acceptance of this proposed theory of "required consent" would destroy the special needs doctrine. "Special needs" exceptions frequently arise in situations, such as this, where the state seeks to condition a certain benefit or privilege upon the individual's agreement to waive Fourth Amendment rights. *See, e.g., Chandler v. Miller*, 520 U.S. 305 (1997) (individuals seeking elected office); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (students seeking to participate in extracurricular sports). In each case where the required waiver is a condition of receiving

a benefit, only those individuals who consent to the condition are subject to search and thus any search would arguably be "consensual." That, however, has never precluded this Court's review of the fundamental question whether the proposed condition reflects a reasonable accommodation of the state's legitimate interests and the individual's constitutional rights.

Were this Court now to hold that required consent to a probation search condition constitutes an enforceable consent to search and forecloses further judicial scrutiny of the condition, the *Griffin* "special needs" doctrine would be obsolete. By the same logic, this "required consent" theory would render irrelevant this Court's special needs jurisprudence in other areas of Fourth Amendment analysis, such as business inspections, home inspections, automobile searches, and drug testing. The state, if not the court, would be free to impose upon aspiring politicians, student athletes, welfare recipients, indigent mothers, automobile drivers, and others the very same conditions that this Court has found to violate fundamental constitutional rights. The only limit the government acknowledges on the state's power under such a "consent" approach – the doctrine of "unconstitutional conditions" – is not ordinarily applied to resolve Fourth Amendment issues. To the extent it is applied in this context, Knights contends that it would require the court to conduct the same balancing that has long been part of the special needs doctrine.

Moreover, as is obvious from closer examination of the jurisprudence underlying "consent" searches, petitioner's required consent to probation conditions in no

way resembles the type of consent previously found sufficient to legitimize an otherwise unconstitutional warrantless search under the consent exception. No precedents support the validity of an unlimited advance waiver of all privacy rights in the home and person. Any such waiver, if it were enforceable, would have to be both knowing and voluntary, judged under the *Ferguson* standard, not the standard *Schneckloth v. Bustamonte* approved for officers conducting a search in the field. 412 U.S. 218 (1973). An agreement to a probation search condition waiving Fourth Amendment rights is not knowing where, as here, the defendant is not informed of his right to refuse consent. Nor was Knights' agreement to abide by his probation conditions a voluntary consent; under the circumstances, it was but acquiescence to the court's show of lawful authority. Finally, even if Petitioner could establish that Knights made a knowing and voluntary waiver of his Fourth Amendment rights in exchange for the grant of probation, the search condition's blanket waiver of rights constitutes an unconstitutional condition. In the Fourth Amendment context, the inquiry under unconstitutional conditions would mirror the inquiry the Court currently performs under the "special needs" analysis and would thus confirm that the instant probation condition is, indeed, unconstitutional.

The dramatic step urged by petitioner is unwarranted and unwise. In *Griffin*, this Court concluded that a state's compelling interest in the operation of its probation system is adequately accommodated by a limited search authority which permits probationary searches, but not regular police searches. Because the search at issue in this case was performed by law enforcement for

law enforcement purposes, not as part of any probationary scheme, it was not a lawful probation search.

ARGUMENT

I. THE CONSTITUTIONALITY OF RESTRICTIONS ON A PROBATIONER'S FOURTH AMENDMENT RIGHTS IS ASSESSED THROUGH A BALANCING OF THE INDIVIDUAL'S PRIVACY RIGHTS AND THE SPECIAL NEEDS OF THE STATE'S PROBATION SYSTEM, NOT BY THE PRESENCE OR ABSENCE OF A REQUIRED CONSENT

A. California's Blanket Search Condition Is Unconstitutional Because this Court Has Already Determined That the Special Needs of a State's Probation System Are Sufficiently Accommodated by a Limited Exception to the Fourth Amendment

This Court addressed the issue of warrantless probation searches in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). The *Griffin* Court observed that "probation has become an increasingly common sentence for those convicted of serious crimes." *Id.* at 875. Relying on *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), the Court noted that all probationers enjoy only a "conditional liberty" dependent upon compliance with special restrictions. *Id.* at 874. As the Court had recognized in *Morrissey*, however, even this conditional liberty "includes many of the core values of unqualified liberty." *Morrissey*, 408 U.S. at 482.[5]

[5] Earlier decisions had declined to apply constitutional procedural protections to probationers or parolees on the theory

Griffin identified the twin goals of probation – rehabilitation of the defendant and protection of the community – and concluded that these goals "require and justify" the exercise of supervision over probationers. 483 U.S. at 875. Requiring a probation officer to obtain a warrant, based on probable cause, before any search would interfere with the probation officer's need to make frequent visits and would undermine the special supervisory relationship between the probation officer and his

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that probation or parole was as "an act of grace" which could be "coupled with such conditions . . . as Congress may impose." *See, e.g., Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935). In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court rejected this approach, concluding that "[i]t is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' " *Id.* at 482 (addressing procedural protections due parolees); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) ("It is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst* that probation is an 'act of grace.' ") (citation omitted).

Rejection of the "privilege" approach came with the recognition that, even thirty years ago, probation had become an integral part of the criminal justice system:

> "A fundamental problem with (the right-privilege theory) is that probation is now the most frequent penal disposition . . . [and] an integral part of the criminal justice process. . . . Seen in this light, the question becomes whether legal safeguards should be provided for hundreds of thousands of individuals who daily are processed and regulated by governmental agencies." F. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training* 32 (Joint Commission on Correctional Manpower & Training 1969).

Morrissey, 408 U.S. at 493 n.3 (Douglas, J., dissenting in part).

"client." *Id.* at 876, 879. This Court therefore concluded that the state's operation of a probation system, "like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74.

Under the special needs doctrine, after first identifying the "special need," the Court assesses the lawfulness of the warrantless search by "balancing the need to search against the invasion which the search entails." *See Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). *See also Ferguson*, 121 S. Ct. at 1288 (special needs balancing test requires "weighing the intrusion on the individual's privacy interest against the 'special needs' that supported the program"); *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (reasonableness of particular practice " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests' ") (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). The *Griffin* Court's conclusion that the search reflected a permissible balance under the Fourth Amendment relied upon three central findings: First, the search was by a probation officer, not a police officer, and was not conducted for normal law enforcement purposes. *Griffin*, 483 U.S. at 871, 876. Second, the search was based upon reasonable suspicion of criminal activity. *Id.* at 878. Third, the warrantless search was reasonable because it was conducted pursuant to a regulation which constrained the discretion of the probation officer and was itself constitutional, in that it reflected a permissible balancing of the special need of

the probation system for supervision in order to further the probationer's rehabilitation and the public's safety against the probationer's reasonable expectation of privacy. *Id.* at 873-875, 880; *see also id.* at 875 (degree to which state may permissibly impinge on probationer's privacy is "not unlimited").

Petitioner suggests that *Griffin* did not establish "a constitutional floor." Brief for Pet. 20 n.11. While it is true that courts applying *Griffin* have not required every state to enact regulations mirroring Wisconsin's, *Griffin* necessarily requires that the warrantless search be a *probation* search, not an investigatory search conducted to further law enforcement interests. This basic distinction between a lawful special needs search and a search conducted primarily for the general needs of law enforcement serves as the constitutional floor not simply in *Griffin* but in every special needs case. *See, e.g., Edmond*, 531 U.S. at 42 (Fourth Amendment requires that Court "draw[ ] the line" at roadblocks designed primarily to serve the general interest in crime control).

Petitioner further asserts that *Griffin* "did not consider whether a person offered probation could validly consent to searches without individualized suspicion [or searches by a broader category of law enforcement officers] as a condition of release." Brief for Pet. 20 n.11 & 28 n.15. It is true that *Griffin* says nothing about a probationer's ability to give a truly voluntary consent to any search, but that is not at issue here. Petitioner urges that a state may *require* a defendant to submit to warrantless, suspicionless searches by law enforcement in order to receive probation. *Griffin* does limit what a court may require because the Court's ruling addresses what the

Fourth Amendment permits. A sentencing court is bound to respect the constitutional limits on its sentencing authority.

The District Court and the Court of Appeals applied the *Griffin* analysis and concluded, correctly, that this search was not a lawful probation search. The search condition imposed upon Knights purports to authorize any law enforcement officer to conduct an investigatory search at any time, for any reason. This search was conducted by law enforcement as part of an ongoing criminal investigation. Under *Griffin*, the search condition is overbroad and the warrantless search was unconstitutional.

B. Across the Country, the Constitutionality of Probation Searches Is Assessed under the *Griffin* "Special Needs" Approach

In the wake of *Griffin*, the federal courts – and the majority of state courts – have relied upon this Court's analysis of the special needs balance to resolve the tension between the needs of a state's probation system and the individual's Fourth Amendment rights. Thus, while the federal courts of appeal generally have not read *Griffin* to preclude the use of police in the execution of probation searches, they have adhered to *Griffin*'s fundamental requirement that the search be for probation purposes. *See United States v. Giannetta*, 909 F.2d 571, 581 (1st Cir. 1990) (search must be for probationary purpose; probation officer may not be used by police to circumvent the Fourth Amendment's warrant requirement); *United States v. Polito*, 583 F.2d 48, 53 n.6 (2d Cir. 1978)

(warrantless probation search may be unlawful if used by police as subterfuge for criminal investigation); *Shea v. Smith*, 966 F.2d 127, 132-33 (3d Cir. 1992) (police may not use probation officer as stalking horse); *United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994) (probation search may not serve as subterfuge for criminal investigation; search upheld where no evidence that probation officer was used to help police evade the warrant requirement); *United States v. Coleman*, 22 F.3d 126, 129 (7th Cir. 1994) (police may not use probation search condition to evade warrant requirement); *United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997) (parole officer may not serve as "stalking horse" for the police); *United States v. Ooley*, 116 F.3d 370, 372 (9th Cir. 1997); *United States v. McCarty*, 82 F.3d 943, 947 (10th Cir. 1996) (police may not use probation officer to evade Fourth Amendment warrant requirement). These decisions make clear that the special needs exception to the warrant and probable cause requirement is restricted to special needs searches; it "is not an open invitation to gamesmanship through which law enforcement personnel can circumvent the rigors of the Fourth Amendment." *United States v. Cardona*, 903 F.2d 60, 65-66 (1st Cir. 1990).

In addition, reflecting *Griffin*'s concern that the probation officer's discretion to search be limited by neutral criteria, several federal courts of appeal have held that the reasonableness of a special needs probation search depends on whether it complies with a regulation that is itself reasonable. *See, e.g., United States v. Conway*, 122 F.3d 841, 844 (9th Cir. 1997) (Wallace, J., concurring in the result); *United States v. Cantley*, 130 F.3d 1371, 1375 (10th Cir. 1997). Alternatively, some federal appellate courts

have held that, in the absence of a regulation, Fourth Amendment reasonableness may be satisfied if the record demonstrates that the court narrowly tailored a probation search condition to the individual probationer's circumstances. *See, e.g., Giannetta*, 909 F.2d at 575-76. A custom-tailored search condition, like a probation regulation, serves to limit the probation officer's exercise of discretion in conducting a warrantless search, as *Griffin* requires. *Id.* at 575.

Regardless of the variations in the particular tests applied, the federal courts that have considered this issue are unanimous in their view that police conducting a criminal investigation may not use a probation search condition as subterfuge for avoiding the Fourth Amendment's warrant requirement. *See, e.g. Giannetta*, 909 F.2d at 581; *United States v. Hill*, 967 F.2d 902, 911 (3d Cir. 1992) (parole officer's search authority stems from the parole system's "special needs"; search upheld where no evidence that parole agents acted on behalf of the police); *Martin*, 25 F.3d at 296; *Coleman*, 22 F.3d at 129; *McFarland*, 116 F.3d at 318; *Cantley*, 130 F.3d at 1376.

Among state courts, California's Supreme Court is out of the mainstream.[6] The majority of state courts

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[6] The blanket waiver required of probationers in California is a creature of the courts, not the legislature. The California legislature has not enacted any statute requiring all probationers to submit to unlimited searches as a condition of probation. The only legislative guidance relating to probation search conditions is the requirement that any probation condition be "reasonable" and further the goals of reparation and rehabilitation. *See* Cal. Penal Code § 1203.1(j); *compare* Cal. Penal Code § 1000.12(c)(1) & (c)(4)(D) (under deferred entry of

distinguish between probation searches and law enforcement searches and will invalidate a warrantless probation search when it is conducted by law enforcement as a subterfuge for avoiding Fourth Amendment requirements.[7]

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judgment provision applicable in child abuse and neglect prosecutions, statute expressly requires defendant to submit to search by any law enforcement officer).

[7] *See, e.g., Roman v. State*, 570 P.2d 1235, 1242 n.20 (Alaska 1977) (search condition must be limited to "authorize searches only by correctional authorities or peace officers acting under their direction"); *State v. Hill*, 666 P.2d 92, 94 (Ariz. Ct. App. 1983) ("it is impermissible for police to use probation officers as a pretext for conducting a criminal investigation"); *People v. Slusher*, 844 P.2d 1222, 1225 (Colo. 1992) ("[t]he fact that a person is on parole does not justify a search without a warrant by any law enforcement officer other than a parole officer"); *State v. Whitfield*, 599 A.2d 21, 24 (Conn. App. Ct. 1991) (ability to search parolee without probable cause does not extend to law enforcement officers); *State v. Harris*, 734 A.2d 629, 634 (Del. 1998) (probation searches "should never be made solely on the basis of a request from law enforcement officials"); *Llanos v. State*, 401 So. 2d 848, 849 (Fla. Dist. Ct. App. 1981) (search condition requiring probationer to "submit to a search at any time by any law enforcement officer" is invalid); *State v. Propios*, 879 P.2d 1057, 1060 (Haw. 1994) (probation search must not be subterfuge for criminal investigation); *People v. Eiland*, 576 N.E.2d 1185, 1192 (Ill. App. Ct. 1991) (distinguishing between a search made for probation purposes and a search conducted by law enforcement officers); *Polk v. State*, 739 N.E.2d 666, 669 (Ind. Ct. App. 2000) ("affording probationers lesser protections is predicated on the premise that probation officers, or police working with probation officers, are conducting searches connected to the enforcement of conditions of probation and not for normal law enforcement purposes"); *State v. Cullison*, 173 N.W.2d 533 (Iowa 1970); *State v. Thomas*, 683 So. 2d 885, 886 (La. Ct. App. 1996) ("a probationer is not subject to the unrestrained

C. There Is a Clear and Workable Distinction Between Probation Searches and Investigatory Searches; Investigatory Searches Are Not Part of Any State's Probation System

Petitioner complains that the distinction between probation searches and investigative searches is unsound because police searches serve to discover whether a probationer is in compliance with the basic requirement that he "refrain from committing further crimes." Brief for Pet. 27. Conceding that the primary purpose of the search in this case was to investigate crime, Petitioner argues that the warrantless search should nonetheless be upheld because it also serves a secondary purpose of assisting the probation department to monitor probationers. *Id.* (search serves probationary purpose "even though" actual purpose is general crime control).[8]

Petitioner's argument fails because it is fundamentally incompatible with the special needs theory. If probation officers, like the police, cared exclusively for crime control and protection of the public, probation searches would not fall within the special needs exception. It is only the twin goals of probation – fostering the probationer's rehabilitation *and* protecting the public – that

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power of the authorities; a search of a probationer may not be a subterfuge for a police investigation"); *Commonwealth v. LaFrance*, 525 N.E.2d 379, 382 n.5 (Mass. 1988) ("police may not properly use the probation office as a subterfuge to conduct a search of a probationer or her premises").

[8] This assertion is itself suspect; the research suggests that Petitioner overstates the value of random police searches in furthering the goals of probation. *See* p. 22 & n.9, *infra*.

distinguish probation officers from regular law enforcement officers and justify treating probation supervision as a special need, beyond the normal need for law enforcement. The fact that law enforcement officers may indirectly further a probation goal does not change this basic distinction. *See, e.g., Edmond*, 531 U.S. at 46-47 (where primary purpose is crime control, lawful secondary purpose insufficient to bring warrantless, suspicionless searches within special needs exception).

Petitioner further objects to the distinction between probation and investigatory searches on grounds that it requires an inquiry into purpose incompatible with consent-search precedents and this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). Because the lawfulness of a warrantless probation search is assessed under the special needs doctrine, however, an inquiry into purpose is essential. *Whren* is not to the contrary.

In *Whren*, this Court held that a search based upon adequate probable cause could not be deemed unreasonable because of the officer's ulterior motives, because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. The Court explicitly distinguished cases which addressed the validity of searches conducted in the *absence* of probable cause. *Id.* at 811.

Subsequently, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court invalidated Indianapolis's drug interdiction highway checkpoint program, explaining: "We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a

checkpoint primarily for the ordinary enterprise of investigating crimes." *Id.* at 44. Indianapolis argued unsuccessfully that *Whren* prohibited any inquiry into the purpose of the checkpoint program. This Court observed that "our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level," and concluded that "*Whren* does not preclude an inquiry into programmatic purpose in such contexts." *Id.* at 46.

Similarly, in *Ferguson*, the Court conducted a "close review" of "all the available evidence" to determine whether the primary purpose of a program of suspicionless searches was to further a legitimate special need distinct from the general interest in crime control. 121 S. Ct. at 1290. Although the state argued that the program requiring drug testing of patients seeking prenatal care had, as its ultimate purpose, the "beneficent" motive of protecting maternal and fetal health, the Court's examination of the record disclosed that "the primary purpose of the Charleston program . . . was to use the threat of arrest and prosecution in order to force women into treatment." *Id.* at 1292. The objective of the searches was "to generate evidence *for law enforcement purposes*." *Id.* at 1291 (emphasis in the original). Given the "extensive involvement of law enforcement," the Court concluded, the program "simply does not fit within the closely guarded category of 'special needs.' " *Id.* at 1292.

In the instant case, the purported connection to the goals of the probation department – i.e., that "the threat of [police searches]" will "force" probationers to obey the law – is no different than the law enforcement purpose

found impermissible in *Ferguson*. *See id.* at 1292. Significantly, this search was not even nominally part of an established probation program; the only program in evidence is the *de facto* program operated by the Napa County Sheriff's Department, which maintains records of probationers in order to facilitate the Department's own searches. Thus the district court and court of appeals correctly determined that the primary purpose of the search was to further a police investigation and that such an investigatory search is not a lawful probation search under the special needs doctrine.

Amici's criticisms of the distinction between law enforcement searches and probation searches are no more persuasive. The State of California's argument that probationers' rehabilitation is dependent on warrantless investigatory searches echoes the "extensive entanglement" problem this Court identified in *Ferguson*. *See id.* at 1292 n.20. Moreover, California provides no evidence to support the assertion that unprovoked searches by police deter crime. In fact, researchers have found no evidence that increased surveillance of probationers is effective in reducing recidivism.[9]

Amicus Center for the Community Interest ("CCI") asserts that "[c]ommunity supervision programs utilizing

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[9] *See, e.g.*, Joan Petersilia, *A Decade of Experimenting With Intermediate Sanctions: What Have We Learned?*, 62 Federal Probation 3, 6 (Dec. 1998). Conversely, researchers have consistently found that rehabilitation is a key component of effective probation supervision. *See, e.g., id.* at 6 (participation in treatment, community service, and employment programs reduces recidivism rates).

warrantless, suspicionless searches, notably in the city of Boston, Massachusetts, have been extremely successful in reducing recidivism and deterring crime." Brief of CCI 3. Quite to the contrary, however, the Boston program does not utilize warrantless investigatory searches by police officers nor, does it appear, do any of the other programs cited in CCI's brief.[10] *See id.* at 16 n.42. Although *amicus* Criminal Justice Legal Foundation ("CJLF") asserts that allowing police to conduct warrantless searches of probationers for law enforcement purposes is a "key component of many probation systems," Brief of CJLF 2, CJLF identifies not a single probation system outside of California that utilizes such searches.

D. Petitioner's Contention that Acceptance of Probation Conditions Falls Within the "Consent" Exception, If Accepted, Would Result in the Destruction of the Special Needs Doctrine

Petitioner contends that a probationer may consent to a more substantial waiver of Fourth Amendment rights than may be involuntarily imposed upon him. Petitioner relies on prior rulings of this Court, primarily *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), upholding the constitutionality of consent searches. As discussed more extensively below, none of the cases cited by Petitioner endorse

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[10] *See* Dale Parent & Brad Snyder, *Police-Corrections Partnerships*, 1999 Issues and Practices in Criminal Justice 11-13 (publication of the U.S. Dept. of Justice, National Inst. of Justice); *see also* James T. Jordan, *Boston's Operation Night Light: New Roles, New Rules*, 67 FBI Law Enforcement Bull. 1 (Aug. 1, 1998). In fact, Massachusetts law requires even probation officers to obtain a search warrant. *See LaFrance*, 525 N.E.2d at 382-83.

the type of unlimited "advance consent" at issue here, *see infra* at 36-40. In addition, however, Petitioner's argument is mistaken because it ignores the fact that many, if not all, warrantless searches resolved under the "special needs" framework involve some type of "consent," either explicit or implicit. *See Ferguson*, 121 S. Ct. at 1295 (Kennedy, J., concurring) ("an essential, distinguishing feature of the special needs cases is that the person searched has consented" to the search).

In *Vernonia School District 47J v. Acton*, 515 U.S. 646, 650 (1995), for example, the challenged drug testing only affected those students who chose to play sports; prior to any testing, those students were required "[to] sign a form consenting to the testing and [to] obtain the written consent of their parents." In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660, 664 (1989), Customs Service employees challenged a policy which required applicants for certain positions to submit to drug tests; the Court applied the special needs analysis to determine whether this " 'exaction of consent as a condition of assignment to [a] new job' " was reasonable under the Fourth Amendment. In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 610-11 (1989), railroad employees faced the choice either to consent to drug testing or, if they declined, to be temporarily withdrawn from the covered position. In *Chandler v. Miller*, 520 U.S. 305, 308 (1997), the challenged statute required candidates for designated state offices to submit to a drug test as a condition of seeking office; the fact that any candidate could avoid the drug test by not running for office did not deter this Court from reviewing the condition and concluding it violated the Fourth Amendment.

In each of those cases, only those individuals who "consented" in order to participate in the particular program, employment, or business, would be subject to the challenged search. Notwithstanding this fact, the Court in each case scrutinized the nature of the government interest and the degree of the intrusion into the individual's privacy to determine whether the search was reasonable. *See also United States v. Biswell*, 406 U.S. 311, 315 (1972) (where business owner consents to inspection, the lawfulness of the search does not depend on consent; "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.").

Not only is consent in such cases a "manifest fiction," *People v. Mason*, 488 P.2d 630, 636 (Cal. 1971) (Peters, J., dissenting), *disapproved on other grounds, People v. Lent*, 541 P.2d 545 (Cal. 1975), it fails to provide any meaningful check on unreasonable government intrusions. If the fictive consent extracted under these circumstances were deemed sufficient to make a search "reasonable" under the Fourth Amendment, all further analysis would become moot. Abandonment of the "special needs" analysis in favor of Petitioner's consent theory would empower the government to dispense with the protections of the Fourth Amendment on a broad scale by requiring the surrender of constitutional rights as a prerequisite to a host of government benefits. If a probationer like Mark Knights may be required to give advance consent to a complete waiver of Fourth Amendment rights in order to be considered for probation, what would prevent the government from requiring applicants

for driver's licenses to give advance consent to suspicionless stops or searches of their cars, candidates for public office to give advance consent to searches of their offices or bodies, welfare recipients to give advance consent to full searches of their homes, or any licensed business to agree to any type of search or seizure of its premises? Under Petitioner's consent theory, the state's power to extract such waivers would be unlimited and removed from any judicial review, constrained, if at all, only by the "unconstitutional conditions" doctrine.

II. KNIGHTS' REQUIRED CONSENT TO THE PROBATION SEARCH CONDITION DOES NOT CONSTITUTE A VALID CONSENT TO THE SEARCH OF HIS HOME

Petitioner contends that Knights faced a choice between probation with a search condition, or jail, that he chose probation, and that he therefore voluntarily consented to be subject to the unlimited searches described in the probation condition. Petitioner proposes that, under such a consent analysis, the only questions for the Court would be: (1) whether Knights' consent to search was voluntary; and (2) whether the search was within the scope of his consent. Petitioner proposes that the only further limits upon the state's ability to exact concessions from a defendant are found in the doctrine of "unconstitutional conditions": even if a valid consent were obtained, did the state exceed its lawful authority by conditioning probation upon a waiver of all Fourth Amendment rights?

Knights has argued in Part I, above, that this search condition exceeds the scope of a valid probation search and that the sentencing court could not require him to accept an unconstitutionally broad search condition in order to receive probation. Knights contends, however, that even under the consent analysis proposed by Petitioner, this search was unlawful.

Petitioner's consent argument is premised upon the view that probation is a privilege, not a right, which may be subject to conditions at the court's discretion. This view was espoused by the California Supreme Court in 1971, shortly before the *Morrissey* decision issued, and has survived to this day. Although similar blanket waivers have been upheld by the California Supreme Court under a consent theory, the California Supreme Court has never presented a satisfying explanation of the way in which the consent doctrine, as expounded by this Court, could function in the context of a forced, advance consent. Over time, the flaws in this approach – including the extreme results to which it leads – have become apparent.[11]

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[11] Four of the seven justices on the California Supreme Court have recently questioned the coherence of the court's approach to probation search conditions and have challenged the construction of a probationer's consent to a search condition as a blanket waiver of Fourth Amendment rights. *See People v. Reyes*, 968 P.2d 445, 453-62 (Cal. 1998) (Kennard, Mosk, & Werdegar, JJ., concurring and dissenting); *People v. Woods*, 981 P.2d 1019, 1029-38 (Cal. 1999) (Brown, Kennard, & Mosk, JJ., dissenting). Three justices have specifically questioned the continued vitality of the "consent" rationale as the basis for warrantless searches of a probationer. *Woods*, 981 P.2d at 1031 (Brown, Kennard, & Mosk, JJ., dissenting) (noting that "the

The errors in California's jurisprudence can be traced almost entirely to the California Supreme Court's 1971 decision in *People v. Mason*, 488 P.2d 630 (Cal. 1971). The *Mason* majority held for the first time that a search condition requiring a probationer to submit to warrantless searches by any law enforcement agent was enforceable under the consent exception to the Fourth Amendment. The only precedent identified as support for the validity of an advance consent – in *Mason* as in all subsequent rulings from the California courts – was *Zap v. United States*, 328 U.S. 624 (1946), a business records inspection case.

Justice Peters, dissenting from the *Mason* majority, identified the same flaws that persist to this day. He noted that the majority's view of probation as "a matter of grace or privilege" had been replaced by recognition that limits applied when the state sought to condition a benefit on the waiver of constitutional rights. 488 P.2d at 635. He further observed that the majority had "turned their back" on established case law recognizing the Fourth Amendment rights of probationers and parolees, and had instead relied on "the manifest fiction that a probationer 'consents' to the condition of his relief." *Id.* at 636.

California courts continued to uphold the validity of blanket search conditions even after this Court's decision

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consent theory articulated in *People v. Bravo* may be largely moot in light of *People v. Reyes*," which had applied administrative necessity rationale to parolees rather than a consent analysis) (citations omitted).

in *Griffin*. The California Supreme Court at first distinguished *Griffin* on the theory that it applied only to searches conducted pursuant to regulations, not conditions imposed by "consent." *People v. Bravo*, 738 P.2d 336, 341 (Cal. 1987). Subsequently, forced to confront the constitutional limits on search conditions imposed on juveniles – who cannot be said to "consent" to their mandatory supervision – the court again declined to follow *Griffin*. *In re Tyrell J.*, 876 P.2d 519, 531-32 (Cal. 1994) (police may rely on a probation search condition of which they are unaware to justify an otherwise illegal search of probationer). Dissenting from the majority in *Tyrell J.*, Justice Kennard observed that the court's ruling was "contrary to the unanimous views of the federal bench, the courts of other states, the legal commentators that have addressed this issue, and this court's own decisions." *Id.* at 538. *See also id.* at 537 ("A policy more at odds with the purpose underlying the Fourth Amendment would be difficult to imagine.").

To the extent this Court chooses to address the consent approach, however, Knights respectfully submits that the instant search fails to meet the requirements of a valid consent. First, where the consent is to future searches, the burden on the government must be to show that Knights' waiver of rights was both knowing and voluntary. *See Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938); *Ferguson*, 121 S. Ct. at 1292. Knights' consent to the probation search condition here satisfies neither prong. Second, even if a proper waiver had been obtained, the condition is unenforceable because it presents an unconstitutional condition. Although this doctrine is not commonly applied in the Fourth Amendment context, it calls

for a balancing test that, in this context, necessarily returns the Court to a test similar to the balancing required by a special needs analysis. Here, the condition is unconstitutional because the intrusion suffered by the probationer who loses all Fourth Amendment rights to the privacy of his person and his home far exceeds the intrusion necessary to achieve the State's legitimate goals of operating its probation system.

A. Knights' Agreement to Consent to Future Probation Searches Was Not a Forfeiture but a Waiver of Rights Which to Be Effective Must Have Been Knowing as Well as Voluntary

Petitioner suggests that the only test necessary for assessing the validity of a probationer's prospective waiver of Fourth Amendment rights is whether the waiver was "voluntar[y]." *See* Brief for Pet. 18 n.9. In *Schneckloth*, 412 U.S. 218, this Court held that the Fourth Amendment protection against warrantless searches could be lost through a defendant's voluntary consent to search, even without knowledge of the right to decline. Yet while the *Schneckloth* decision speaks in terms of "waiver," the Court declined to apply the traditional requirements of waiver analysis. Reviewing the *Schneckloth* decision reveals that the Court, instead, approached the issue as a forfeiture of rights.

The rationale behind *Schneckloth* does not apply to a waiver obtained at sentencing. Furthermore, this Court's decision in *Ferguson* establishes that an agreement to waive Fourth Amendment rights that is obtained outside

the ordinary context of a police investigation must be a knowing and voluntary waiver.

The Court has recognized that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); other citations omitted); *see also Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring the judgment) (distinguishing between waiver and forfeiture). A right that may be forfeited can be lost through mere inadvertence or failure to act. Unlike waiver, forfeiture may occur without the bearer of the right even realizing the existence of that right. However, a right that requires waiver cannot be lost without such a knowing abandonment.[12]

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973), the Court declined to "impose on the normal consent search the detailed requirements of an effective warning," including articulation of the right to decline consent. The Court explained that its holding was necessary because "[i]t would be unrealistic to expect that in the informal,

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[12] Confusion arises because the Court has used the terms "waiver" and "forfeiture" interchangeably notwithstanding their distinct meanings. *See Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (noting that the terms waiver and forfeiture "are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision"). *See generally* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2053-56 (2000).

unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*." *Id.* at 245. The Court explicitly distinguished the standard it was applying to the normal consent search from the more detailed waiver inquiry prescribed in *Johnson v. Zerbst*, an inquiry "that was designed for a trial judge in the structured atmosphere of a courtroom," not for the officer in the field. *Id.* at 243-44.

Although the holding in *Schneckloth* does not address a formal agreement to relinquish Fourth Amendment rights in the future, the Court's reasoning strongly suggests that such an advance waiver, obtained by "a trial judge in the structured atmosphere of a courtroom," must comply with the *Johnson v. Zerbst* requirements. *Id.* There is no incongruity in the application of different standards depending on the context in which the right is lost; to the contrary, context frequently determines whether a right may be forfeited or must be waived. *Compare, e.g.*, Fed. R. App. P. 3 (right to appeal may be forfeited by failing to file a timely notice), *with United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (advance promise in plea agreement not to file appeal must be knowing and voluntary waiver). Moreover, in a similar context, this Court has suggested that a "prospective waiver" of statutory protections would require a different standard than consent to an isolated incident. *See New York v. Hill*, 528 U.S. 110, 115 (2000) (evidence of defendant's consent to a single delay under the Interstate Agreement on Detainers sufficient because "this case *d*[*oes*] *not involve a purported prospective waiver of all protection* of the IAD's time limits or of the IAD generally, but merely agreement to a specified delay in trial") (emphasis added).

This Court's decision in *Ferguson* last term confirms that a consent to a search that exceeds the scope of a permissible "special needs" search requires a waiver that is both knowing and voluntary. 121 S. Ct. at 1292. In *Ferguson*, the Court found that the proposed search was not justified under the special needs doctrine but rather had as its primary purpose the collection of incriminating evidence against hospital patients. The Court therefore concluded that the standards of knowing waiver require that the patients be "fully informed about their constitutional rights" for any consent to be enforceable. *Id.* Although the Court did not repeat the standards for knowing waiver, it is apparent from the citation to *Miranda* that, at a minimum, the individual be informed of her right to decline consent.

The sentencing court required from Knights a prospective waiver of virtually all protections of the Fourth Amendment. Because what the court sought was the intentional relinquishment of the defendant's Fourth Amendment rights, the waiver had to be both knowing and voluntary.

B. Agreement to a Probation Search Condition Waiving Fourth Amendment Rights Is Not Knowing Where the Defendant Is Not Informed of His Right to Refuse Consent

The burden falls on the government to establish that Knights' waiver was valid and enforceable. *Schneckloth*, 412 U.S. at 222. Petitioner has relied on the *Schneckloth* standard and thus does not address whether Knights' waiver of his Fourth Amendment rights was knowing

and intelligent. *Cf.* Brief for Pet. 18 n.9. A review of the record establishes that Petitioner will be unable to meet this burden because there is no evidence in the record that Knights was ever informed that he could, if he chose, decline to waive his Fourth Amendment rights. *Compare Miranda v. Arizona*, 384 U.S. 436 (1966); *Ferguson*, 121 S. Ct. at 1292.

Petitioner concedes that Knights was required to agree to the search condition in order to receive probation. *See* Brief for Pet. 10 ("Respondent was *required*, as one of the conditions of his probation, to '[s]ubmit his * * * person, property,' " etc., to search at any time) (emphasis added; omission in original); *see also id.* at 23 (if probationer does not consent, "the alternative is incarceration"); *id.* at 28 (defending State's authority to "make release on probation contingent upon the probationer's voluntary consent to search[ ]"). The only evidence of Knights' agreement to the search condition or of his "consent" to be searched is a one-page document entitled "PROBATION *ORDER*." J.A. 50 (emphasis added). That order states that the defendant, having been convicted of a misdemeanor violation, "IS HEREBY *ORDERED*" to submit to several conditions, including warrantless searches. *Id.* (emphasis added). Knights placed his signature beneath a statement that he had received a copy of the order and agreed to abide by the terms and conditions of probation.

Petitioner contends that Knights had the option, if he did not agree with the probation condition, of going to prison. *See* Brief for Pet. 23-24. Regardless of whether this

is an accurate statement of current California law,[13] there is no evidence in the record that Knights was informed he had this option. There is similarly no indication in the record that Knights was informed that he could refuse to accept the search condition and still receive probation. Considering that the California courts have taken the position that a probationer may be *required* to "consent" to a blanket waiver of all Fourth Amendment rights in order to receive probation, it seems unlikely that Knights was informed of this option.

Under *Griffin*, of course, a probationer such as Knights may be required to endure certain intrusions into his Fourth Amendment rights whether he consents or not. *See supra* at 13-16. Thus, to provide Knights with an

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[13] This basic premise of petitioner's argument does not appear to be correct. Petitioner asserts that "[u]nder California law, a criminal defendant may not be compelled to accept probation." Brief for Pet. 17 (citing *People v. Mason*, 488 P.2d 630 (1972)). *Mason* cited no statutory support for this proposition but instead relied on earlier California Supreme Court precedents in which this conclusion was found to follow from the then-accepted view that the right of a defendant to refuse probation if accompanied by onerous conditions was a necessary safeguard because of the lack of any other limitations on the court's power to impose conditions. *Mason*, 488 P.2d at 632. Because probation is now recognized as an integral part of the criminal justice system, not an "act of grace," the continued vitality of this reasoning is questionable.

Moreover, even if this was an accurate statement of California law in 1972, it is no longer the law today. Under current California law, probation is now mandatory for first offenders convicted of a nonviolent drug possession offense. Cal. Penal Code § 1210.1(a). No "consent" theory may be applied to these probationers.

accurate advisement of rights, the court would have had to explain to him that while on probation he could, regardless of his consent, be subject to warrantless searches provided the searches were conducted for a probationary purpose. Thus the proper focus of the waiver would be on those remaining, diminished Fourth Amendment rights that a probationer retains under *Griffin*. An accurate advisement of rights would inform the probationer that he had a choice whether to waive these remaining rights, and that even if he declined to waive these rights he would still receive probation because the court could not require him to submit to greater intrusions than those necessary for the purposes of probation.

C. Knights' Agreement to Abide By His Probation Conditions Was Not Voluntary Consent but Acquiescence to a Show of Lawful Authority

The government " 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' " *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). The Court considers "the totality of the surrounding circumstances" to determine whether the defendant has made an "essentially free and unconstrained choice." *Id.* at 225-26.

In support of the voluntariness of this consent, Petitioner relies upon three cases: *Schneckloth, Bumper v. North Carolina*, 391 U.S. 543 (1968), and *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). None support the voluntariness of this advance consent. Both *Schneckloth* and *Bumper* concerned specific,

contemporaneous searches conducted promptly upon the individual's agreement to the particular request to search; neither addressed the possibility of an "advance consent." In *Schneckloth*, the defendant literally consented to the search ("Sure, go ahead") and assisted the officer in its execution. 412 U.S. at 220. Thus, voluntariness was essentially undisputed; the question before this Court was whether under those circumstances the officer was required to inform the defendant of his right to refuse.

Bumper is more illuminating. The consent in *Bumper* was obtained by four officers who arrived at the home of the defendant's mother and informed her that they had a search warrant to search her house. In response, Mrs. Bumper permitted the officers to enter and conduct a search. Thus (paraphrased slightly), the question in *Bumper* was whether a search can be justified as lawful on the basis of consent when the consent has been given only after the official who obtains the consent has asserted that he possesses lawful authority to conduct the search regardless of consent. 391 U.S. at 548. This Court was clear: "there can be no consent under such circumstances." *Id.* Rather, the facts established no more than "acquiescence to a claim of lawful authority," which is not a voluntary consent. *Id.* at 548-49; *see also id.* at 549 n.14 ("One who, upon the command of an officer authorized to enter and search . . . [,] acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law.") (internal citation and quotation marks omitted).

The record in this case establishes that the "consent" which underpins Petitioner's argument is nothing more

than Knights' signature on a "PROBATION ORDER." Following the words "[IT] IS HEREBY *ORDERED*," *id.* (emphasis added), the order sets forth the terms and conditions of probation, including the search condition. The form allows room for the defendant's signature following a brief paragraph that includes the statement: "I have received a copy, read and understand the above terms and conditions and agree to abide by same." J.A. at 50 (all capitals in original).

Under these circumstances, Mr. Knights' agreement to obey the court's order was just that: agreement to abide by what appeared to be a lawful court order. Nothing in the order suggests that compliance is optional. Knights had no reason to suspect that the order exceeded the scope of the court's lawful authority. Even if he had harbored suspicions about the lawfulness of the search condition, these would not have provided a legal basis for Knights to refuse to abide by its terms. *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967) (doubts regarding constitutionality of court order do not provide lawful defense to its violation). Under these circumstances, Knights' acceptance of a probation search condition was no more than acquiescence to the sentencing court's show of lawful authority.

The only other authority cited by Petitioner is *Zap v. United States*, 328 U.S. 624 (1946), a decision addressing the legality of warrantless inspection of a defense contractor's business records. *Zap*, which has formed the lone pillar supporting the California Supreme Court's

advance consent theory for many years,[14] authorized an inspection of business records; it does not support the constitutionality of a blanket advance consent to unlimited searches of the home and person.

Zap was one of two opinions addressing business records inspections authored on the same date by Justice Douglas. *See also Davis v. United States*, 328 U.S. 582 (1946). Both *Zap* and *Davis* concerned warrantless searches carried out at the contractor's place of business. In each case, the scope of the search was narrowly tailored by an authorizing statute which set forth with particularity the object of the search – business records, and gasoline ration coupons, respectively – and the time, place and manner in which records could be inspected. In each case, the Court found that the business owner had consented to the inspection by virtue of the decision to do business with the government in a heavily regulated industry. Notwithstanding this evidence of "consent," however, the Court still examined the scope of the search and the manner of its execution before concluding, based on all of the facts, that the particular searches at issue were not unreasonable under the Fourth Amendment.[15]

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[14] *Zap* was the only federal precedent invoked by the California Supreme Court as support for the constitutionality of a condition requiring an "advance waiver" of Fourth Amendment rights in exchange for a grant of probation. *Mason*, 488 P.2d at 634; *see also Woods*, 981 P.2d at 1023 (citing *Zap*).

[15] In *Zap*, the business owner executed a contract repeating the same terms set forth by statute. In *Davis*, there was no evidence that the business owner had executed a contract. The existence of the contract was one factor but not determinative in the Court's analysis.

Moreover, Justice Douglas explicitly distinguished the Fourth Amendment analysis applicable to a warrantless inspection of records from the much more stringent analysis that would apply to the search of a private home.[16] *See Davis*, 328 U.S. at 587-88, 592; *Zap*, 328 U.S. at 628 (relying on *Davis*); *see also Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) (constitution affords "greater latitude to conduct warrantless inspections of commercial property" than private homes because sanctity of home merits significantly greater expectation of privacy). Thus, none of the cases cited by Petitioner supports the claim that acceptance of a search condition purporting to waive Fourth Amendment protections in the home constitutes the type of "consent" sufficient to foreclose further review of the reasonableness of the condition itself.

D. Even If Petitioner Could Establish That Knights Voluntarily Waived His Fourth Amendment Rights in Exchange for the Grant of Probation, the Blanket Waiver of Rights Constitutes an Unconstitutional Condition

Knights has argued that a condition restricting a probationer's Fourth Amendment rights is permissible only if it satisfies the special needs inquiry described in

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[16] While *Zap* states that the petitioner had "waived" his claim to privacy by entering into business in which he specifically agreed to permit inspection of his accounts, subsequent cases have made clear that the evaluation of the reasonableness of a warrantless inspection of a commercial business is not resolved simply by an analysis of the voluntariness of business owner's consent. *See, e.g., United States v. Biswell*, 406 U.S. 311, 315 (1972).

Griffin, and that the instant search condition fails that test. Assuming, *arguendo*, that the Court were to assess the condition instead under Petitioner's consent analysis, and assuming further still that Petitioner could establish that Knights' consent to the search condition was knowing and voluntary, the search condition would nonetheless be unlawful under the doctrine of unconstitutional conditions. To the extent that the state threatened to deny probation to Knights unless he agreed to waive his Fourth Amendment rights (above and beyond the loss of rights contemplated in *Griffin*), the search condition constitutes an unconstitutional penalty on Knights' exercise of a fundamental constitutional right for the same reason that it fails the special needs analysis.

The unconstitutional conditions problem arises when the government, having discretion to grant or deny a benefit, grants the benefit upon conditions that require the offeree to waive a constitutional right. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6-7 (1988). The unconstitutional conditions doctrine thus applies in situations, such as this, when the government "seeks to achieve its desired result by obtaining bargained-for consent." *Id.* at 7 (emphasis in original omitted). To determine whether a particular condition improperly penalizes exercise of a constitutional right, the Court has adopted a two-part inquiry: (1) first, is there an "essential nexus" between the condition burdening rights and a "legitimate state interest"; and (2) if so, is there a "rough proportionality" between the burden on the individual and the harm the government seeks to remedy through the condition. *Dolan v. City of Tigard*, 512 U.S. 374, 385-86, 391

(1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

The precise meaning of these standards in the Fourth Amendment context is untested, as this Court does not ordinarily apply the unconstitutional conditions doctrine to resolve a Fourth Amendment challenge. *See* Brief of Pet. 22 (citing First Amendment examples). Knights submits that, in the Fourth Amendment context, the inquiry under unconstitutional conditions would mirror the inquiry the Court currently performs under the "special needs" analysis and would thus confirm that the instant probation condition is, indeed, unconstitutional.

Petitioner's limited argument on this front is telling. First, Petitioner's reliance on the California courts' standard to determine the constitutionality of a probation condition is unhelpful, as constitutional questions are resolved by this Court without deference to the state court's views. Second, the only support Petitioner cites for the purported "nexus" between the blanket search condition and legitimate state interests is *Griffin*'s holding that probationers require supervision. Brief for Pet. 22-23. Yet *Griffin* nowhere holds that random, suspicionless searches by law enforcement are related to legitimate goals of probation. To the contrary, the *Griffin* opinion addresses at great length the aspects of a lawful probation search that *distinguish* it from a search by law enforcement. *See Griffin*, 483 U.S. at 876-81. Under *Griffin*, the proposed search condition fails even the first prong of an unconstitutional conditions analysis because a condition requiring a defendant to submit to non-probationary

searches cannot be essentially connected to the state's interest in the operation of its probation system.[17]

The blanket waiver similarly fails the second prong of unconstitutional conditions analysis: the requirement of "rough proportionality." Knights respectfully submits that, in the Fourth Amendment context, the Court would assess proportionality by "weighing the intrusion on the individual's privacy interest against the 'special needs' that supported the program." *See Ferguson*, 121 S. Ct. at 1288. This is, of course, the test already applied under the special needs approach. *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (constitutionality under the Fourth Amendment "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests") (internal citation and quotation marks omitted).

The conclusion that this blanket waiver constitutes an unconstitutional condition is further supported by this Court's rejection of a similar blanket waiver in *Minnesota v. Murphy*, 465 U.S. 420 (1984). In *Murphy*, the defendant challenged the admissibility of incriminating statements he had made to his probation officer. *Id.* at 425. The

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[17] Petitioner repeats the California Supreme Court's frequent, but unsupported, assertion that unlimited, suspicionless searches by police further the probation system by measuring the probationer's compliance with the conditions of his release. Brief for Pet. 22. This ignores the deleterious effect that a complete deprivation of privacy may have on the probationer's rehabilitation. *See, e.g., Mason*, 488 P.2d at 637 (Peters, J., dissenting) ("Such searches [by law enforcement] measure the effectiveness of rehabilitation in the same manner that one fells a tree to measure its age.").

defendant was subject to a probation condition which required him to answer questions from his probation officer truthfully. *Id.* at 422-23. Although the defendant had not asserted his Fifth Amendment privilege during the interview, he argued that the privilege was self-executing because, under the circumstances, he faced a substantial penalty if he exercised his Fifth Amendment rights. *Id.* at 425.

The Court agreed with the defendant's reasoning but not with his premise. Reviewing the actual language of the probation condition, the Court observed that the condition "proscribed only false statements; it said nothing about his freedom to decline to answer . . . and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege." *Id.* at 437. The Court made clear that a condition requiring such an advance waiver would be an unconstitutional condition:

> There is . . . a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435.

CONCLUSION

A court may not lawfully require from a probationer a waiver of Fourth Amendment rights greater than is necessary to accommodate the "special needs" of the probation system. Mr. Knights' agreement to abide by an unconstitutionally broad search condition was not a knowing and voluntary waiver of rights and does not constitute an enforceable "consent" to warrantless investigatory searches by police. For all of the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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